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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

MAY - 7 1991

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Petitions for Declaratory Ruling)	MMB File No. 910221A
Regarding Reversionary and)	MMB File No. 870921A
Security Interests)	

To: Chief, Mass Media Bureau

REPLY COMMENTS OF
AMERITRUST COMPANY NATIONAL ASSOCIATION,
CHEMICAL BANK AND NEW BANK OF NEW ENGLAND, N.A.

On April 22, 1991, Ameritrust Company National Association, Chemical Bank and New Bank of New England, N.A. (the "Banks") submitted their joint comments (the "Bank Comments") in this proceeding. Set forth below is a brief response to certain of the comments filed by other parties:

1. The Capstar Comments Provide No Basis for Denying the Requested Declaratory Relief.

Virtually all of the comments filed in this proceeding support the position of the Banks--i.e., that the Commission should recognize a limited security interest in broadcast licenses. The sole exception is the Joint Comments filed by Capstar Communications, Inc., et al (the "Capstar Comments"). However, the Capstar Comments rely entirely on inaccurate and unsupported interpretations of the Uniform Commercial Code ("UCC") and the legal principles that would govern a limited security interest of the type sought by the Banks.

According to the Capstar Comments, a security interest in a station license will "allow the lender immediately to take

possession of the license without Commission approval. . . ."

Capstar Comments at 6 (emphasis in original). Moreover, according to the Capstar Comments, this "immediate claim to possession of the license" (emphasis in original) would run "in perpetuity," regardless of the Commission's rules and policies or the provisions of the Communications Act. Id. See also Capstar Comments at 16. No citations are offered to support these propositions, and they are, quite simply, wrong.

A security interest, by definition, is a derivative interest that extends only to the rights of the grantor in the pledged collateral. See UCC § 9-203; State Bank of Young America v. Vidmar Iron Works, Inc., 292 N.W.2d 244, 28 UCC Rep. Serv. 1133, 1142 (Minn. 1980) (bank had security interest in debtor's inventory only to extent of debtor's rights, which were based on payments due under contracts; bank properly sought only to recoup those payments). As stated in the leading commentary on the UCC:

[the] "rights in the collateral" language [taken from UCC § 9-203] merely states a truism, namely, that the debtor normally can only convey something once he has something, and that something may be less than the full bundle of rights that one may hold in such property.

J. White and R. Summers, Uniform Commercial Code, § 22-6 (2d ed. 1988).

As explained in the Bank Comments, the principal "right" of the licensee to which a limited security interest in a broadcast license would attach is the right to the full value realized and/or realizable from disposition of a station's assets and operations. See Bank Comments at 9-13. This right, and all

other rights of the licensee (and thus, derivatively, those of the secured party) with respect to the broadcast license, are fully subject to the provisions of the Communications Act and the Commission's rules and policies--including the requirement for Commission approval of any transfer or assignment of the license and the powers of the Commission to revoke or refuse renewal of the license. See Bank Comments at 20-23. Neither the Banks nor any other proponent of a limited security interest in broadcast licenses has suggested that such a security interest would entitle the secured party to "immediate possession" of the license or to "perpetual rights." It is pure fantasy to assert that such a result would be necessitated by the provisions of the UCC.

Indeed, Section 9-104(a) of the UCC expressly provides that the provisions of federal statutes, such as the Communications Act, supersede inconsistent provisions of the UCC. Thus, under Section 9-104(a), secured parties could not enforce rights under the UCC or security agreements that were inconsistent with the Communications Act or the Commission's rules and policies promulgated thereunder. Even in the absence of Section 9-104(a), the same result would obtain under the Supremacy Clause of the United States Constitution and the "preemption doctrine" derived therefrom. See City of New York v. FCC, 466 U.S. 57 (1988) (upholding the Commission's regulations

preempting state and local regulation of technical standards for cable television signal quality).^{1/}

It is curious that the Capstar Comments do not question the validity of the various restrictions imposed on licensee stock pledges pursuant to the Communications Act and the Commission's rules and policies. See Capstar Comments at 16. The Capstar Comments conclude, without analysis or legal support, that such stock pledges are permissible because foreclosure pursuant to such stock pledges cannot occur without Commission approval, whereas (according to the Capstar Comments) foreclosure on a security interest in a station license could occur "immediately." Yet stock pledges, like security interests, are governed by the UCC, which draws no such distinction and which provides for the same rights and remedies with respect to pledged stock and other collateral subject to a security interest. See UCC § 8-321. The fact is that restrictions on a pledgee's exercise of voting rights and foreclosure with respect to a licensee's stock are created solely by the Communications Act and the Commission's rules and policies, which supplement (and, to the extent inconsistent, supersede) the provisions of the UCC. The same provisions would apply to restrict a secured party's

^{1/} The Capstar Comments suggest that preemption under Section 9-104(a) is limited solely to provisions in federal "statutes" as opposed to regulations promulgated thereunder by the responsible federal agency. However, it is clear that federal regulations adopted by a federal agency acting within the scope of its congressionally delegated authority preempt state law, such as the UCC, to the same extent as federal statutes. City of New York, supra, at 63-64; Louisiana Public Serv. Comm'n. v. FCC, 476 U.S. 355, 368-69 (1986).

exercise of rights and remedies pursuant to a security interest in a station license.

In sum, a limited security interest in rights under a broadcast license would be subject to all of the provisions of the Communications Act and the Commission's rules and policies. The Commission will retain full authority with respect to the issuance, revocation and assignment of broadcast licenses. The Commission should make these fundamental limitations clear in granting the declaratory relief sought in this proceeding.

2. The Commission Need Not Address in this Proceeding Certain Issues Raised by Other Commenters.

Certain of the parties filing comments in this proceeding have suggested that the Commission take action beyond the declaratory relief sought by the Petitioner and the Banks. For example, General Electric Capital Corporation ("GECC") suggests that the Commission initiate a general rulemaking proceeding to address assignment and transfer application procedures. Comments of GECC at 10-13. The law firm of Santarelli, Smith & Carroccio ("SS&C") suggests that the Commission adopt procedures whereby a lender and a licensee/debtor can appoint an independent trustee in connection with the grant of a security interest. Comments of SS&C at 11.

Whatever the merit of such suggestions, the Banks urge that they not be considered in this proceeding.^{2/} As set forth

^{2/} Indeed, GECC explicitly recognizes that the issue of modifying assignment and transfer application procedures "goes well beyond the scope of the Petition," and that it would be "inappropriate for the Commission to consider this issue within the context of the instant proceeding." Comments of GECC at 13.

in the Bank Comments, the relief most urgently required by the Banks and other broadcast lenders is the simple recognition of a limited security interest in rights attendant to a broadcast license. The additional procedural protections sought by GECC and SS&C, while potentially worthy of consideration by the Commission in due course, should not be permitted to cloud the primary issues in this proceeding or to delay the declaratory relief sought by the Petitioner and the Banks.

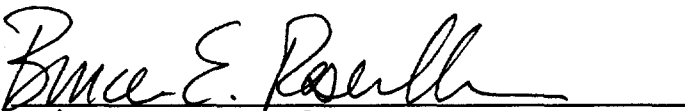
3. Conclusion.

For the reasons set forth above and in the Bank Comments, the Banks respectfully request that the Commission expeditiously grant the request for a declaratory ruling that creditors may take a limited security interest in a broadcast license or in rights attendant thereto.

Respectfully submitted,

AMERITRUST COMPANY NATIONAL
ASSOCIATION
CHEMICAL BANK
NEW BANK OF NEW ENGLAND, N.A.

By:



Eric L. Bernthal
Gary M. Epstein
Bruce E. Rosenblum
Martin F. Petraitis
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, DC 20004-2505
(202) 637-2200

Their Attorneys

Dated: May 7, 1991

CERTIFICATE OF SERVICE

I, Camala Harris, do hereby certify that I have on this 7th day of May, 1991, caused copies of the foregoing Reply Comments of Ameritrust Company National Association, Chemical Bank and New Bank of New England, N.A. to be served by first class U.S. mail, postage prepaid, upon the following:

Roy J. Stewart*
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, DC 20554

Kathleen Ham, Esq.*
Policy & Rules, Legal Branch
Federal Communications Commission
2025 M Street, N.W., Room 8002
Washington, DC 20554

Victor E. Ferrall, Jr.
John T. Scott, III
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Marvin J. Diamond, Esq.
Hogan & Hartson
555 13th Street, N.W.
Washington, DC 20004

Stephen C. Simpson
1233 20th Street, N.W.
Suite 205
Washington, DC 20036

The First National Bank of Chicago
One First National Plaza
Chicago, IL 60670

James E. Scott
Associate General Counsel & Assistant Secretary
The Chase Manhattan Bank, N.A.
1 Chase Plaza
New York, NY 10081

* HAND DELIVERED

Mr. Gregg E. Johnson
Vice President
American Security Bank
1501 Pennsylvania Avenue, N.W.
Washington, DC 20013

Edmund P. Rogers, III
Senior Vice President & Resident Counsel
J.P. Morgan & Co., Inc.
60 Wall Street
New York, NY 10260

Tom W. Davidson
Margaret L. Tobey
Janet S. Crossen
Sidley & Austin
1722 Eye Street, N.W.
Washington, DC 20006

John Beisner
F. Amanda DeBusk
O'Melveny & Myers
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004

Martin R. Leader
Scott R. Flick
Gregory L. Masters
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W., Suite 800
Washington, DC 20037

Philip J. Smith
Ropes & Gray
One International Place
Boston, MA 02110

Irwin L. Gubman
Senior Vice President & Associate General Counsel
Bank of America
P.O. Box 37000
San Francisco, CA 94137

A. Thomas Carroccio
Nathaniel Rayle
Santarelli, Smith & Carroccio
1155 Connecticut Avenue, N.W., Suite 900
Washington, DC 20036

Andrew I. Douglass, Esq.
Executive Vice President & General Counsel
Heller Financial, Inc.
200 North LaSalle Street
Chicago, IL 60601

Diane S. Killory
Ellen G. Block
Susan H. Crandall
Morrison & Foerster
2000 Pennsylvania Avenue, N.W., Suite 5500
Washington, DC 20006

Paul J. Sinderbrand
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Penthouse
Washington, DC 20005



Camala Harris